Supreme Court of the United States.

Nos. 307, 308, 309 and 312.—October Term, 1903.

No. 307. Ah How, alias Louie Ah How, Appellant,
vs.
The United States.

No. 308. Chu Do, alias Chu Gee, Appellant,
vs.
The United States.

No. 309. Lew Guey, Appellant,
vs.
The United States.

No. 312. Yung Lee, Appellant,
vs.
The United States.

Appeals from the District Court of the United States for the Eastern District of New York.

[February 23, 1904.]

Mr. Justice Holmes delivered the opinion of the Court.

These are appeals from judgments of the United States District Court confirming decisions of a commissioner, and adjudging that the appellants be removed from the United States to China. *Chin Bak Kan* v. *United States*, 186 U. S. 193. The commissioner decided that each of the appellants was a Chinese laborer found without certificate of residence as required by law within the United States, and was not entitled to remain within the United States. The facts may be summed up as follows: The appellants were arrested in July, 1902, when working in laundries, they all having failed to produce certificates of residence when called upon to do so by the Chinese inspector. At the hearing before the commissioner they offered testimony of witnesses other than Chinese that they were residents of the United States on May 5, 1892. Ah How and Chu Do put in evidence that they were not laborers. Yung Lee offered evidence of illness, which he contended made him unable to procure his certificate. Chu Do offered parol evidence that he was born in the United States, and therefore was a citizen, and also that he was a minor during the time allowed by the statute for obtaining a certificate. Lew Guey offered similar evidence and a certificate of another United States commissioner of

a hearing before him and an adjudication that Lew Guey had the right to remain in the United States by reason of being a citizen thereof. The United States offered no evidence beyond the facts stated above.

The ground of appeal common to all the cases is that §§ 3 and 6 of the act of May 5, 1892, 27 Stat. 25, have been repealed. By § 3 any Chinese person arrested under the provisions of the act shall be adjudged to be unlawfully within the United States, unless he shall establish by affirmative proof to the satisfaction of the judge or commissioner his right to remain. Of course, if the burden of proof was on the appellants, the commissioner and judge might not be satisfied by the affirmative evidence produced. We are not asked to review the finding of fact. See *Fong Yue Ting* v. *United States*, 149 U. S. 698, 714, 715. *But it is argued that this* section is done away with by § 1 of the act of April 29, 1902, c. 641, 32 Stat. 176, continuing all laws then in force, "so far as the same are not inconsistent with treaty obligations." It is said that the section is inconsistent with Article 4 of the treaty of December 8, 1894, 28 Stat. 1210, agreeing that Chinese laborers, or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens. It is pointed out that the treaty of 1894 with Japan and the treaty of 1859 with Paraguay give the rights and privileges of native citizens to the subjects of those countries in access to the courts and in the defense of their rights, and it is said that the law as to the burden of proof cuts down those privileges and rights. The section has been upheld, however, by this Court, since the treaty, and after the passage of the act. *Chin Bak Kan* v. *United States*, 186 U. S. 193, 200; *United States* v. *Lee Yen Tai*, 185 U. S. 213. It is not repealed by the laws of 1902. The clause of the treaty had a different object, and in view of the difficulties encountered in such an investigation, it could not have been supposed to promise that special measures theretofore taken should not be continued in force for the purpose of ascertaining the very question whether the laborers were lawfully residing in the United States or not. See *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730. But it is enough to say that the treaty itself, in Article 5, expressly refers to the act of 1892 as amended by the act of 1893, and states that the Chinese government will not object to the enforcement of those acts.

It follows still more clearly from the language of Article 5 of the treaty that § 6, as amended by the act of November 3, 1893, 28 Stat. 7, remains in force. *Lee Lung* v. *Patterson*, 186 U. S. 168, 176, 177. That section requires Chinese laborers who are entitled to remain in the United States to obtain a certificate of residence from the collector of internal

revenue of their district, or to be deported, subject to certain excuses. Article 5 of the treaty especially refers to the requirement of registration in the acts of 1892 and 1893, although, as we have said, it states that the enforcement of the acts as a whole will not be objected to. In one or two of the cases there was a suggestion below that § 6 of the act was unconstitutional, but that question was disposed of in *Fong Yue Ting* v. *United States*, 149 U. S. 698, and was not pressed.

The complaints are objected to as insufficient, because in addition to alleging that the appellants are laborers not entitled to remain in the United States without certificates, it adds the words "having come unlawfully into the United States without certificates," thus implying, it is said, that an unlawful coming into the United States could be legalized by obtaining a certificate. It is enough to say that such objections have been answered by *Fong Yue Ting* v. *United States*, 149 U. S. 698, 729, and *Chin Bak Kan* v. *United States*, 186 U. S. 193, 199. In the former it was laid down that "no formal complaint or pleadings are required." That proposition is not affected by the later statutes. We do not mean to imply that there is anything in the objection if we should consider it on its merits.

As to the testimony that two of the appellants were merchants during the period of registration, all that appears is that the commissioner did not believe it. We cannot go outside the record of the specific case for the purpose of inquiring whether the decision was induced by some view of the law which may be open to argument. The same may be said as to the parol testimony as to the age of two of the appellants on their birth in this country. But we may add that it by no means follows from the decision in *United States* v. *Gue Lim*, 176 U. S. 459, that the minor children of laborers, old enough to do work, are not required to have certificates. The language of the statute certainly is broad enough to include them and does not indicate a division by local laws with regard to coming of age. The principle applicable to the admission into this country of the wife and children of a certificated merchant is not the principle applicable to such a case. As to the certificate of the United States commissioner, offered by Lew Guey, it was merely a written statement by the commissioner that a person of that name was brought before him on the usual charge, and was adjudged to have the right to remain in the United States by reason of being a citizen. Apart from the possibility that the commissioner in the present hearing was not satisfied of the identity of the party, such a statement is not the certificate of evidence required by the act of 1892, and is not evidence of a judgment. *United States* v. *Lee Poy Dew*, 119 Fed. Rep. 786. The evidence that Yung Lee was disabled by sickness from obtaining a certificate did not satisfy the commissioner. We cannot say as matter of law that he was bound to be satisfied by the testimony of Yung Lee himself that he was so disabled.

We have assumed, for the purpose of decision, what does not clearly appear from the record, that the judge who tried the case on appeal tried it solely on the commissioner's report of evidence and heard no witnesses. Whether the fact could be assumed if the result would be a reversal of the judgment below, we need not decide. See *United States* v. *Lee Saick*, 100 Fed. Rep. 398, 399. There is no other question worthy of notice. We are asked to express an opinion as to the right of the appellants to give bail pending their appeal, but that now is a moot point. We agree with the Government, that these cases are covered by previous decisions of this Court.

Judgment affirmed.

Mr. Justice BREWER and Mr. Justice PECKHAM dissent.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

Nos. 310, 311 and 313.—October Term, 1903.

Tom Hong, alias Hom Poe, Appellant,		
310	*vs.*	
	The United States.	
Tom Dock, alias Hom Dock, Appellant,		Appeals from the District Court of the United States for the Eastern District of New York.
311	*vs.*	
	The United States.	
	Lee Kit, Appellant.	
313	*vs.*	
	The United States.	

[March 21, 1904.]

These cases were considered together and are appeals from an order entered in the District Court of the United States for the Eastern District of New York, affirming an order made by a United States commissioner, directing the deportation of the appellants from the United States to China upon the ground that they were found within this country without certificates of registration, as required by the act of May 5, 1892, as amended November 3, 1893. (1 Comp. Stat. 1901, 1322.)

The complaint charges that the appellants, being Chinese laborers, not entitled to remain in this country without certificates of registration, did willfully and knowingly fail to obtain the certificates required by law, and, having unlawfully come within the United States, were found without certificates of registration within the jurisdiction thereof, in the Eastern District of the State of New York.

Testimony was heard in the cases, and at the conclusion of the hearings the commissioner made an order finding each of the appellants a Chinese laborer, without a certificate of registration as required by law, and not a merchant doing business within the meaning of the act of 1892 as amended 1893, and not lawfully entitled to remain in this country.

In each of the cases the commissioner, in addition to the judgment just recited, filed a finding, which was made part of the record by order of the District Court, as follows:

"In the matter of Lee Kit, Tom Hong and Tom Dock.

"Before B. L. Benedict, U. S. commissioner.

"In these three cases it is urged on one side that the decision of the Circuit Court of Appeals of this circuit, in the case of *United States* v. *Pin Kwan*, requires the commissioner to decide that these three Chinese persons

were not merchants within the meaning of the statute in 1894, and that being now laborers without certificate of residence they must be deported. On the other side it is urged that the decision of the court in that case was only that the merchant's certificate that Pin Kwan had was not the certificate required by law, and could not be effective to allow his remaining here, and that the discussion of the effect and weight of evidence which the court itself had said it was error to admit (a certificate being the sole proof admissible) goes merely to show what the court thought of the evidence in that case which differed from the present one. Admitting the distinction I do not think the United States commissioner is at liberty to disregard carefully expressed language of the Circuit Court of Appeals for the circuit, even though a dictum of the court as to the precise question before it. The proofs furnished in this case are sufficient to show that these three persons were engaged in business rather than in manual labor in 1894, but not to show a real interest of each in the business as partners; they do not to my mind clearly establish facts which would bring these persons within the statute as merchants. If follows that an order for deportation for each one must be made.

"I certify the foregoing to be a true copy of an original decision made by me in the cases of *The United States* v. *Lee Kit*, *The United States* v. *Tom Hong* and *The United States* v. *Tom Dock*, upon application for orders of deportation of the said Lee Kit, Tom Hong and Tom Dock, made on the 18th day of December, 1902, and remaining on file in my office.

[L. S.] B. LINCOLN BENEDICT,
U. S. Comm."

Mr. Justice DAY, after making the foregoing statement, delivered the opinion of the Court.

The contention of the appellants that their right to remain in the United States is enlarged by the treaty with China of December, 1894, considered with § 1 of the act of April 29, 1902, c. 641, 32 Stat. 176, continuing all laws then in force so far as the same are not inconsistent with treaty obligations in its effect upon the acts of 1892, as amended in 1893, is disposed of by the case of *Ah How* v. *United States*, decided at this term.

For the first time in the history of legislation, having for its purpose the exclusion of certain Chinese from the country, or their deportation when here in violation of the statutes of the United States, and the admission of certain others to the country, or giving the right to remain, Congress, by the act of May, 1892, as amended November 3, 1893, defined those theretofore designated generally as merchants or laborers:

"SEC. 2. The words 'laborer' or 'laborers,' wherever used in this act, or in the act to which this is an amendment, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation.

"The term 'merchant,' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant

is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

It is contended by the appellants that as by section six of the act as amended November 3, 1893, it is made the duty of certain Chinese laborers within the limits of the United States to apply to the collector of their respective districts within six months after the passage of the act for a certificate of registration, and in default of compliance with the terms of the act, to be subject to arrest and deportation, unless, for certain reasons given in the statute excusing them, they have been unable to procure the certificate required by law; and as section two of the same act specifically defines what is meant by a "laborer," that only such as come within the statutory provision as "laborers" are liable to deportation upon an affirmative finding of this fact as to the person apprehended.

On the part of the Government, it is contended that when a Chinese laborer is apprehended under this act and found without a certificate, and claiming to have been a merchant during the period of registration, he is subject to deportation unless it is affirmatively shown to the satisfaction of the commissioner or court that he was a merchant, as defined by the statute, during such period of registration.

We do not find it necessary to determine this question in the cases now before us, for in the opinion of the court the testimony shows that the appellants were "merchants" within the definition laid down by the law. The testimony shows, without contradiction and by disinterested witnesses other than Chinese, that the appellants had been in this country for periods varying from ten to thirty years. That in the years from 1891 to 1895 they were carrying on a Chinese grocery in New York, known as the Kwong Yen Ti Company. In that period they bought and sold groceries, kept books of account and had articles of partnership. It is a fact that the testimony does not disclose, as to any of them, that the business was conducted in his name, as the literal interpretation of the law would seem to require, but it was carried on in a company name, which did not include that of any of the partners. The fact of buying and selling at a fixed place of business in a real partnership was established without contradiction.

It is true that after the lapse of so many years the appellants, when taken before the commissioner, were unable to produce the books or articles of copartnership of the firm. But some allowance must be made for the long delay in their prosecution by the government, and the natural loss of such testimony years after the firm's transactions were closed.

The commissioner was doubtless influenced by the intimation in the Pin Kwan case, (100 Fed. Rep. 609,) to the effect that the statutory requirements

as to the conduct of the business in the name of the parties necessitated the appearance of the name in the style in which the business was conducted. But this would be too narrow a construction of the statute. The purpose of the law is to prevent those who have no real interest in the business from making fraudulent claims to the benefits of the act as merchants. The interest in the business must be substantial and real and in the name of the person claiming to own it, but the partner's name need not necessarily appear in the firm style when carried on, as is usual among the Chinese, under a company name, which does not include individual names. The main purpose is to require the person to be a *bona fide* merchant, having in his own name and right an interest in a real mercantile business, in which he does only the manual labor necessary to the conduct thereof. This conclusion has been reached in a number of Federal cases, in which the matter has been given careful consideration. Perhaps the leading one was decided by the Circuit Court of Appeals for the Ninth Circuit, (*Lee Kan* v. *United States*, 62 Fed. Rep. 914,) the opinion being delivered by Mr. Justice McKenna, then circuit judge, in which the subject was so fully considered as to leave little to be added to the discussion. See also *Wong Ah Gah* v. *United States*, (94 Fed. Rep. 831;) *Wong Fong* v. *United States*, (77 Fed. Rep. 168.)

It is true that the findings of the commissioner and in the District Court in cases of this character should ordinarily be followed in this court, and will only be reconsidered when it is clear that an incorrect conclusion has been reached. (*Chin Bak Kan* v. *United States*, 186 U.S. 193–201.) But in the present case no new matter seems to have been admitted in the District Court, and the finding made by the commissioner as to these appellants is of an uncertain nature when the judgment is read in connection with the special finding filed by that officer and made part of the record in each case, in which he says: "The proofs furnished in this case are sufficient to show that these three persons were engaged in business rather than in manual labor in 1894."

In this state of the record an examination thereof satisfies us that the appellants adduced testimony which established that they were *bona fide* "merchants" within the meaning of the law at the time registration was required of laborers by the act of Congress, and as the orders of deportation were made on the sole ground that appellants failed to show that fact the

Judgments are reversed and appellants discharged.